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COURT OF CRIMINAL APPEALS
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In the

TEXAS COURT OF CRIMINAL APPEALS

Austin, Texas

STATE OF TEXAS,
Appellant-Petitioner

v.

DAI'VONTE E'SHAUN TITUS ROSS,
Appellee-Respondent

On the State's petition for discretionary review from
The Fourth Court of Appeals, San Antonio, Texas

Appellate Cause No. 04-16-00821-CR

Tried in the County Court at Law No. 15, Bexar County, Texas

Trial Cause No. 519657

State's Brief in Reply to Ross's Brier on the Merits

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STATEMENT OF THE CASE

This case arises out of the State appealing the trial court's order quashing the information due to lack of notice. This Court granted the State's petition for discretionary review without oral argument and the State filed its brief on the merits on March 12, 2018. Ross filed his brief on April 12, 2018. The State files this reply brief contemporaneously with a motion for leave.

ARGUMENT

Does "calculated" mean "intended" or "likely"?

In previous briefs, the State has proposed that a "calculated" action is an intentional or deliberate action taken with careful estimation to accomplish a purpose. *See* THE AMERICAN HERITAGE DICTIONARY 228 (2nd ed. 1991) (An act is "calculated" when it is "[u]ndertaken after careful estimation of the likely outcome."); MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 161 (10th ed. 1993) (An act is "calculated" if it is "planned or contrived to accomplish a purpose."); *see also* ROGET'S II THE NEW THESAURUS 139 (Expanded ed. 1988) ("calculated": "1. Planned, weighed, or estimated in advance, or 2. Resulting from deliberation and careful thought.").

This understanding of the term is consistent with the two courts of appeals that have previously construed section 42.01(a)(8). In *Ex parte Poe*, 491 S.W.3d 348 (Tex. App.—Beaumont 2016, pet. ref'd), the Beaumont Court of Appeals examined whether the statute was unconstitutionally vague. *Id.* at 353. That court held that the statute was not vague on its face and construed the word "calculated" as "planned or contrived so as to accomplish a purpose or achieve an effect: thought out in advance: deliberately planned[.]" *Id.* at 354 (quoting WEBSTER'S THIRD NEW INT'L DICTIONARY 315 (2002). Using this definition, the court reasoned that the use of the term "calculated" in conjunction with the statute's

general requirement of intent or knowledge required "a high burden of proving the requisite mental state." *Id.* at 355. In *Lovett v. State*, 523 S.W.3d 342 (Tex. App.—Fort Worth 2017, pet. ref'd), the Fort Worth Court of Appeals quoted the Beaumont Court's opinion with approval and noted that, in Lovett's case, the prosecution did not meet its "high burden of proving the requisite mental state." *Id.* at 348–49 (quoting *Poe*).

Both *Lovett* and *Poe* construe the term "calculated" in the same way the State has proposed in Ross's case. Ross suggests otherwise and cites to *Comm'n for Lawyer Discipline v. Benton*, 980 S.W.3d 425 (Tex. 1998), for the proposition that "calculated" can also mean "likely," at least in the context of disciplinary rule 3.06(d) (Appellee's Brief on the Merits at 11–12). *See also* BLACK'S LAW DICTIONARY 244 (10th ed. 2014) ("calculated": "1. Arrived at through mathematical computation. 2. Undertaken after close consideration of the probable outcome. 3. Planned so as to achieve a specific purpose. 4. *Likely*." (emphasis added)).

Having reflected upon Ross's argument, the undersigned counsel can think of two other instances in Texas criminal law that use the term in a similar fashion. A conviction may not be reversed "unless the error appearing from the record was calculated to injure the right of the defendant." TEX. CODE CRIM. PROC. art. 36.19. Also, to obtain a self-defense jury charge on provocation, the State must show

> (1) that the defendant did some act or used some words which provoked the attack on him, (2) that such act or words were *reasonably calculated* to provoke the attack, and (3) that the act was done or the words were used for the purpose and with the intent that the defendant would have a pretext for inflicting harm upon the other.

Elizondo v. State, 487 S.W.3d 185, 198 (Tex. Crim. App. 2016) (quoting *Smith v. State*, 965 S.W.2d 509, 513–14 (Tex. Crim. App. 1998) (emphasis added)). In the context of article 36.19, "calculated" means "likely" because an appellant does not need to show that a trial court purposely or intentionally injured his rights. And the use of "calculated" in the second element of a provocation instruction means "likely" because the third element of that instruction refers to the actor's purpose and intent.

Returning to the present statute, is Ross correct? Or are the Fort Worth and Beaumont courts of appeals correct?

Reading "calculated" to mean "likely" does not change the result of the Sixth Amendment analysis.

The question here is whether Ross has notice of what criminal conduct the State alleges he already committed. The information gives him notice of a particular statutory violation on a particular date at a particular location. This allegation will assist Ross in determining which discrete act of display is the basis of the information. Knowing this information, he should be able to locate witnesses, visit the scene of the alleged offense to determine if there is any

remaining physical evidence that can be collected of photographed, and determine which defenses may be applicable to his trial.

The use of the term "calculated" as "intended" or "likely" does not change the location of the crime, what physical evidence is relevant, who was present at the scene, or what legal defenses are available. Similarly, the use of the term "alarm" without further description—no matter how vague it may be in the context of speech—also does not impede any of these tasks.

Reading "calculated" to mean "likely" still does not make the term "alarm" in the context of displaying a firearm.

Though there may appear to be some dissonance between defining "calculated" to mean "likely" as opposed to "intentional" or "deliberate," the distinction is minor because under either definition the law creates a prohibition that is easily understood by common people. If "calculated" refers to "intentional" or "deliberate," then the law prohibits any manner of public display where the actor intentionally and deliberately sets out to cause alarm.[1] If it means "likely,"

[1] Ross interprets the State's interpretation as meaning that "a person passes from lawful conduct into prohibited conduct by the operation of his or her mind" (Appellee's Brief on the Merits at 20). To be clear, the State is not advocating that a person can be convicted with a naked intent. In order for the display to be in a "manner calculated to alarm," the actor's calculation must manifest itself in some way through the display. This calculation could manifest itself subtly, such as tapping or pointing to a weapon in a context that would leave no doubt that the actor was deliberately trying to alarm another. Or it could be accomplished through a more egregious manner, such as waving a gun in front of a crowd.

then the law prohibits any manner of public display that the actor intends or knows to be likely to cause alarm in an average, ordinary person. *See Wagner v. State*, 539 S.W.3d 298, 308 (Tex. Crim. App. 2018) (applying intent and knowledge to the entire following phrase).[2]

Simply put, there is very little practical or moral difference between an actor engaging in conduct to deliberately cause a sensitive person to be alarmed and engaging in conduct that he knows is likely to cause an ordinary, average person to be alarmed. The legal condemnation of either action is perfectly consistent with the peaceful and lawful open carry of firearms.

Along this line, Ross argues that the "display of a firearm in public is not forbidden conduct" in response to an argument made by the State (Appellee's Brief on the Merits at 12–13). According to Ross, it cannot be forbidden conduct because Texas generally allows the carrying of firearms. This argument fails to acknowledge that most crimes consist of conduct that might not be criminal if committed without a particular culpability. For instance, if a person only by accident causes the death of another while driving a car, he or she is not guilty of murder. *See* TEX. PENAL CODE § 19.02(b) (requiring some level of intent or knowledge or felony conduct to satisfy murder). Or, if a person exposes himself to his wife with the intent to arouse in the privacy of the bedroom, he is not guilty of indecent exposure. *See id.* at § 21.08(a) (requiring a person to be reckless about whether another is present who will be offended or alarmed to satisfy indecent exposure). Subject to few exceptions, any *actus reus*, no matter how innocuous or how extreme, must be accompanied by a *mens rea*.

[2] The law would require this perspective just like the section 42.01(a)(1) would require this perspective. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942) (acknowledging that "fighting words" are assessed from the perspective of "what men of common intelligence would understand would be words likely to cause an average addressee to fight" (quoting the lower court)); *Ross v. State*, 802 S.W.2d 308, 315 (Tex. App.—Dallas 1990, no pet.) (citing *Chaplinsky* and noting that section 42.01(a)(1) requires the perspective of "men with common intelligence").

This statute does not discourage or interfere with the open carry of firearms.

This statute has been on the books in one form or another for at least a century. *See* 1911 TEX. PENAL CODE art. 470. Throughout this period, Texans have enjoyed the right to carry rifles and shotguns in public. Recently, the legislature provided for a limited right to carry a handgun in public, so long as the person is licensed and secures the handgun in a holster. *See* TEX. GOV'T CODE § 411.172(a)(2); TEX. PENAL CODE § 46.035(a). Section 42.01(a)(8) does not interfere with, or discourage the exercise of, these rights. It simply seeks to promote peace in the public sphere by ensuring that people carry their weapons responsibly.

PRAYER FOR RELIEF

The Petitioner-State prays that this Court overrule the opinion of the court of appeals and reverse the trial court's order granting Ross's motion to quash.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Nathan E. Morey, assistant district attorney for Bexar County, Texas, certify that a copy of the foregoing brief has been delivered by email to Mac Bozza and the Office of the State Prosecuting Attorney on April 21, 2018 in accordance with Rules 6.3(a), 9.5(b), and 68.11 of the Texas Rules of Appellate Procedure.

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CERTIFICATE OF COMPLIANCE

I, Nathan E. Morey, certify that, pursuant to Texas Rules of Appellate Procedure 9.4(i)(2)(D) and 9.4(i)(3), the above petition for discretionary review, excluding the cover page, identity of parties, table of contents, index of authorities, certificate of service, and certificate of compliance, contains less than 2,294 words according to the "word count" feature of Microsoft Office.

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